Supreme Court, U.S.
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No. 97___

In The

Supreme Court of the United States

October Term, 1997

FREDERICK L. STIVENDER,

Petitioner,

vs.

FRANKLIN D. POWELL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where an indigent defendant's appointed counsel states that he will not assist the defendant during a critical stage of the proceedings, and the defendant repeatedly asks for the assistance of counsel, may a state trial court refuse to appoint counsel and force the defendant into self-representation?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Frederick Stivender respectfully prays that a Writ of Certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The Ninth Circuit Court of Appeals issued its opinion in this case on October 2, 1997. A copy of that opinion is attached as Appendix A. The Court of Appeals denied rehearing in the case on November 19, 1997. A copy of that denial is attached as Appendix B.

JURISDICTION

The original opinion of the Ninth Circuit Court of Appeals was filed on October 2, 1997. That Court denied rehearing on November 19, 1997. This Court has jurisdiction pursuant to 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution and the Due Process guarantee of the Fourteenth Amendment. The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Fourteenth Amendment provides in relevant part:

> Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In California state court, petitioner was tried for first degree murder arising out of a shooting which occurred during a bar fight. Two starkly different versions of events were presented to the jury. The state presented witnesses to support a theory of first degree, premeditated murder. In contrast, petitioner testified in his own defense, admitted the shooting and claimed self-defense.

The jury accepted neither version. Instead, it unanimously acquitted petitioner of first degree murder, but convicted him of the lesser offense of second degree murder. After his conviction, petitioner asked his appointed lawyer to move for a new trial. RT 971. The major ground on which petitioner sought to pursue the new trial motion was a claim that the evidence did not support the jury's verdict. RT 964-965, 975, 982.

Petitioner's appointed lawyer refused. RT 971. He made no secret of his reasoning: he refused to make the new trial motion on the grounds requested because he believed the asserted grounds "should be raised in a writ of habeas corpus." RT 971.

Petitioner repeatedly asked the state trial court to appoint him a lawyer who would file such a motion. The

court refused. Instead, it gave petitioner a continuance to prepare a new trial motion *in propria persona*. The court never inquired whether petitioner was knowingly and intelligently waiving his right to counsel in accordance with *Faretta v. California*, 422 U.S. 806 (1975). Petitioner tried to prepare a written motion by himself, but later told the state court that he was unable to do so without the assistance of a lawyer. RT 963-970.

When the state court refused to appoint counsel, petitioner did his best to argue the motion orally. Magistrate Judge Woodruff would later describe petitioner's attempt to present his motion orally and without representation by counsel as a "faltering discourse." Report and Recommendation of April 10, 1996 at 3.

As respondent has never even disputed throughout this litigation, the grounds appointed counsel stated for his refusal to file the new trial motion – that the issue should be presented in a petition for writ of habeas corpus – were not only wrong, but demonstrated a fundamental misunderstanding of the governing principles of California law.

A new trial motion attacking the weight of the evidence may **not** be raised in a habeas petition. Nor may it be raised on direct appeal. Under California law the trial court is the last entity which can **weigh** the evidence. *People v. Robarge*, 41 Cal.2d 628, 633-635 (1953); *People v. Diaz*, 140 Cal.App.3d 821, 826 (1983). In performing this function, the trial court is not bound by the jury's decision as to conflicts in the evidence or the credibility of the witnesses. *People v. Robarge, supra*, 41 Cal.2d at 633-635; *People v. Sarrazawski*, 27 Cal.2d 7, 15-16 (1945).

In stark contrast, under California law subsequent reviewing courts may **not** weigh the evidence. Instead, they may only examine the record to determine if the evidence is sufficient to support the verdict. In performing this review – and unlike the trial court on a new trial motion – subsequent reviewing courts **are** bound by the jury's decision as to conflicts in the evidence as well as its determination as to the credibility of the witnesses. *People v. Sarrazawski, supra,* 27 Cal.2d at 15-16.

It was this precise distinction between the limited review available post-conviction, and the broad de novo review available at a new trial motion, which petitioner pointed to again and again in requesting counsel to represent him in the filing of such a motion. RT 964-965, 975, 982. Petitioner asked the trial court to judge the credibility and weight of the evidence. RT 964-965. He told the court that because it was the last entity which could assess the credibility of the witnesses, he wanted counsel to represent him. RT 975, 982. As the record shows, petitioner asked for counsel at his new trial motion **precisely so that he could have representation at what would be his last opportunity for de novo review**.

Ultimately, the trial court required petitioner to personally argue the new trial motion **without** the benefit of counsel. The court never warned him of the dangers of representing himself, nor did it appoint counsel to argue the motion. After listening to the petitioner's argument, the court denied the motion and imposed a 17 year-to-life sentence. RT 994-1000.

After exhausting state remedies, petitioner sought relief in federal court. His claim was simple; he was

denied his right to counsel at the new trial motion. Alternatively, he was entitled to warnings regarding the dangers of self-representation before he was allowed to represent himself. He got neither.

Magistrate Judge Woodruff recommended that relief be granted. Both the district court and Ninth Circuit disagreed, upholding the conviction because petitioner "had trial counsel at all times." Reasoning that he was entitled to no more, the Ninth Circuit denied relief.

This Petition for Writ of Certiorari is taken from the decision of the Ninth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

This case involves an issue which strikes at the core of our adversary system of justice. Despite his repeated protestations, petitioner in this case was completely deprived of counsel at a critical stage of the proceedings against him.

This violated the fundamental right to counsel this Court recognized over 30 years ago in *Gideon v. Wainwright*, 372 U.S. 335 (1963). Appointment of a lawyer who refuses to represent his client **based solely on ignorance of the law** cannot satisfy the Sixth Amendment right recognized in *Gideon*.

Certiorari is appropriate here for two reasons. First, as a general matter, the Ninth Circuit's ruling that the mere presence of a lawyer necessarily satisfied the Sixth Amendment runs contrary to a long line of this Court's

precedents. Second, as a specific matter, the Ninth Circuit's ruling runs counter to the weight of authority from federal and state jurisdictions across the country applying the Sixth Amendment to new trial motions.

As a dissenting Ninth Circuit judge wrote almost 20 years ago, "the purpose of *Gideon* was not merely to supply criminal defendants with warm bodies, but rather to guarantee reasonably competent representation." *Cooper v. Fitzharris*, 586 F.2d 1325, 1338, n.11 (9th Cir. 1978) (conc. and dis. opn. of Hufstedler, J.) Judge Hufstedler, and the other federal and state courts that have faced this question throughout the country, were correct. Because the right of an indigent defendant to the effective assistance of counsel at a new trial motion should not depend on the fortuity of which jurisdiction he happens to be in, certiorari is appropriate.

I.

CERTIORARI MUST BE GRANTED TO REVIEW THE NINTH CIRCUIT'S HOLDING THAT THE PRESENCE OF A LAWYER WHO DOES NOT KNOW THE LAW SATISFIES THE SIXTH AMENDMENT.

Following his conviction, petitioner requested his appointed lawyer to file a new trial motion on his behalf. Based on a gross misunderstanding of state law, court-appointed counsel refused.

Again and again petitioner asked the court to appoint him a lawyer who would file such a motion. Again and again the court refused.

The court gave petitioner a continuance to prepare a new trial motion *in propria persona*. Petitioner was unable

to do so and so advised the court. At no time did the trial court inquire whether petitioner was knowingly and intelligently waiving his right to counsel in accordance with this Court's decision in *Faretta v. California*, 422 U.S. 806, 835 (1975). Instead, the court sentenced petitioner to a term of 17 years to life. Despite petitioner's repeated request for counsel, no counsel was ever appointed to prepare, file or argue a new trial motion on defendant's behalf and, in fact, no such motion was ever prepared, filed or argued.

In his April 10, 1996 Report and Recommendation, Magistrate Judge Woodruff recommended that relief be granted, concluding that "the [state] trial court committed plain error by refusing to honor Petitioner's request for counsel. . . . " Report and Recommendation of April 10, 1996 at 7-8. The district court and Ninth Circuit disagreed, reasoning that the Sixth Amendment was not violated because petitioner had a lawyer at his side during the "faltering discourse" that became his new trial motion.

As noted above, certiorari is appropriate in this case for two reasons. First, the Ninth Circuit's treatment of this issue runs contrary to a long line of this Court's precedents. Contrary to the panel's opinion, the nominal presence of a lawyer at counsel table has never been held – in and of itself – to satisfy the Sixth Amendment. *See, e.g., Holloway v. Arkansas*, 435 U.S. 475 (1978); *Geders v. United States*, 425 U.S. 80 (1976); *Herring v. New York*, 422 U.S. 853 (1975).

Second, certiorari is appropriate because the Ninth Circuit's treatment of this issue is an aberration from the

weight of authority throughout the country. Federal and state courts across the country overwhelmingly hold that a new trial motion is a critical stage of the proceedings at which indigent defendants are entitled to the effective assistance of counsel. *See, e.g., Robinson v. Norris*, 60 F.3d 457, 460 (8th Cir. 1995); *Johnson v. Mizell*, 912 F.2d 172, 176 (7th Cir. 1990); *Oldham v. State*, 889 S.W.2d 461, 462 (Tex. Crim. Ap. 1994); *King v. State*, 613 So.2d 888, 891 (Ala. Crim. Ap. 1993); *Adams v. State*, 405 S.E.2d 537, 539 (Ga. Ap. 1991). Thus, when a defense lawyer refuses to pursue a new trial motion based entirely on a misunderstanding of the law, the defendant has been denied his right to counsel. *See, e.g., Oldham v. State*, 889 S.W.2d at 462.

Except in the Ninth Circuit, the nominal presence of a lawyer at the defendant's side does **not** satisfy the Sixth Amendment where that lawyer believes he cannot file a new trial motion on defendant's behalf. *Robinson v. Norris*, 60 F.3d at 460 (defense counsel did not file a new trial motion on defendant's behalf because he could not argue his own ineffectiveness at trial; held, Sixth Amendment violated when trial court told defendant to represent himself); *Oldham v. State*, 889 S.W.2d at 462 (defense counsel did not file new trial motion because of a mistake of law; held, defendant was denied his Sixth Amendment right to counsel even though he was "technically" represented by counsel).

As Justice O'Connor noted more than a decade ago, the Sixth Amendment "envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). A lawyer who refuses to represent his client solely because of a misunderstanding of the law

cannot possibly serve this purpose. The Sixth Amendment does indeed demand more than the presence of a "warm body" at counsel table. *See Cooper v. Fitzharris*, 586 F.2d at 1338, n.11.

The Ninth Circuit's contrary ruling in this case ignores this Court's precedent and departs from the weight of authority in other jurisdictions. Certiorari is appropriate.

CONCLUSION

For all the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

GARDNER & DERHAM
CLIFF GARDNER*

GORDON BROWNELL

*Counsel of Record

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FREDERICK L. STIVENDER, Plaintiff-Appellant, v. FRANKLIN POWELL, Warden, in his capacity as Warden, Defendant-Appellee.	No. 97-15032 D.C. No. CV-95-03480-MMC **MEMORANDUM*** (Filed Oct. 2, 1997)

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Submitted September 15, 1997**
San Francisco, California

Before: KOZINSKI, MAYER,*** and
FERNANDEZ, Circuit Judges.

Frederick L. Stivender, a California State prisoner, appeals from the denial of his petition for a writ of habeas corpus. He asserts an instructional error at his trial and that he was denied counsel at trial. We affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel finds this case appropriate for submission without oral argument pursuant to 9th Cir. R. 34-4 and Fed. R. App. P. 34(a).

*** Hon. H. Robert Mayer, United States Circuit Judge for the Federal Circuit, sitting by designation.

1. Procedural Default. Stivender did not raise his claims in the California courts in a timely manner. Therefore, those claims were procedurally defaulted. *See In re Harris*, 5 Cal. 4th 813, 829, 855 P.2d 391, 407, 21 Cal. Rptr. 2d 373, 380 (1993); *see also In re Clark*, 5 Cal. 4th 750, 765-67, 855 P.2d 729, 738-39, 21 Cal. Rptr. 2d 509, 518-19 (1993). Thus, the claims cannot be raised here absent cause and prejudice. *See Coleman v. Thompson*, 501 U.S. 722, 750-51, 111 S. Ct. 2546, 2564-65, 115 L. Ed. 2d 640 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 87-88, 97 S. Ct. 2497, 2506-07, 53 L. Ed. 2d 594 (1977).

In his reply brief, but not until that brief, Stivender argues that there was no procedural default rule in California at the time of his state court appeal, or at least none was effective to bar later federal relief. That, he says, is because California had no consistent rule regarding procedural defaults. *See Siripongs v. Calderon*, 35 F.3d 1308, 1317-18 (9th Cir. 1994). His claim is interesting, but it was waived by his failure to raise it until his reply brief. *See United States v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992); *United States v. Loya*, 807 F.2d 1483, 1487 (9th Cir. 1987). Thus, he is thrown back on an argument for cause and prejudice in the form of ineffective appellate counsel.[1]

2. Cause and Prejudice. Stivender asserts that cause and prejudice is satisfied because his appellate counsel on direct appeal was ineffective when he failed to

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[1] Were we to consider the claims on the merits, we would reject them for much the same reasons as we reject his cause and prejudice assertion.

raise the issues which Stivender now raises. We determine effectiveness of appellate counsel in the usual way. That is, we ask whether counsel's performance was so deficient that he "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). That, in turn, means that counsel's services must have been "outside the wide range of professionally competent assistance." *Id.* at 690, 104 S. Ct. at 2066.

In making that decision about appellate counsel, it must be borne in mind that it is not necessary to raise every nonfrivolous issue on appeal. *See Pollard v. White*, 119 F.3d 1430, 1435 (9th Cir. 1997). Indeed, we hope that appellate counsel will concentrate on the truly important issues, while eschewing those which could conceivably succeed but which are not very likely to do so. *See Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989); *cf. Pollard*, 119 F.3d at 1435.

Even if counsel's performance does not rise to these relatively undemanding standards, ineffectiveness is not shown absent a further showing that counsel's errors were so serious that his client was denied a fair proceeding. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064.

Stivender's first assertion is that appellate counsel should have argued that the trial court should have given an instruction regarding the self defense rights of an initial aggressor. We disagree. For good or ill, it is clear that the thrust of Stivender's defense at trial was that he believed he was defending himself the whole time. An instruction on the initial aggressor theory would have

undercut his attempt to portray himself as a person who thought he was defending himself at all times. That being so, it can hardly be said that appellate counsel had to raise the initial aggressor issue on appeal in order to be effective. Indeed, it appears that the instructions at trial covered the defense theories and were not erroneous at all. No doubt the California Court of Appeal would have so held. Certainly, we cannot say that the failure to give the instruction in question constituted federal constitutional error. *See Duckett v. Godinez*, 67 F.3d 734, 746 (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1549, 134 L. Ed. 651 (1996); *Dunckhurst v. Deeds*, 859 F.2d 110, 114 (9th Cir. 1988). Counsel was constitutionally effective.

Stivender's second assertion fares no better. He claims that appellate counsel should have asserted that he was *denied* trial counsel at his new trial hearing in state court.[2] No doubt Stivender was entitled to counsel at his new trial motion proceeding. *See Menefield v. Borg*, 881 F.2d 696, 699 (9th Cir. 1989). But his claim is otiose because he had trial counsel at all times. The fact is that trial counsel considered Stivender's new trial assertions to be meritless and, therefore, refused to present them. An attorney is not required to present claims "which he knows to be meritless on the facts and the law." *Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994). Judges hope that counsel will not do so.

If counsel were wrong, perhaps a claim of ineffective assistance could be made, but the client would have had

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[2] He does not assert that trial counsel was ineffective, and he never presented an ineffectiveness claim to the state courts, even on habeas corpus.

counsel nonetheless. Neither appellate counsel, nor the California Court of Appeal, nor this court could be expected to harken to the call of Stivender's lur, which invites a blurring of the line between *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (denial of counsel), and *Strickland* (ineffective assistance of counsel). His appellate counsel's failure to raise the question was not professional incompetence.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FREDERICK L. STIVENDER, Plaintiff-Appellant, v. FRANKLIN POWELL, Warden, in his capacity as Warden, Defendant-Appellee.	No. 97-15032 D.C. No. CV-95-03480-MMC ORDER (Filed Nov. 19, 1997)

Before: KOZINSKI, MAYER,* and FERNANDEZ, Circuit Judges.

The panel has unanimously voted to deny the appellant's petition for rehearing. The suggestion for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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* Hon. H. Robert Mayer, United States Circuit Judge for the Federal Circuit, sitting by designation.